UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 721

Case No. 798: HEVI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Vincent Hevi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 May 1994;

Whereas, on 31 May 1994, the Applicant filed an application requesting the Tribunal, inter alia:

"8. ...

(a) To rescind the decision of the Secretary-General to summarily dismiss the Applicant;

(b) To order the Applicant's immediate reinstatement with payment of full salary and applicable allowances and benefits from the date of his separation from service to the date of reinstatement;

(c) To find and rule that the Joint Disciplinary Committee erred as a matter of law in failing to find that the Applicant's rights to due process and fundamental fairness were violated ...;

...

(f) To award the Applicant appropriate compensation ... for the actual, consequential and moral damages suffered by the Applicant to his career and reputation, as a result of the Respondent's actions or lack thereof;

(g) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two years' net base pay;

(h) To award the Applicant, as costs, the sum of $5,000."

Whereas the Respondent filed his answer on 12 September 1994;

Whereas the Applicant filed written observations on 16 November 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 28 May 1974, as a Field Service Officer at the FS-3 level, on a one year fixed-term appointment. His appointment was renewed on an annual fixed-term basis through 1 July 1979, when it was converted to a probationary appointment, which became permanent on 1 April 1980. The Applicant was promoted to the FS-4 level on 1 April 1982. From 15 December 1983, the Applicant was assigned to the United Nations Truce Supervision Organization (UNTSO), Jerusalem, as Finance Clerk. On 1 January 1986, his functional title was changed to Finance Assistant. From 26 June 1989, he was temporarily assigned to the United Nations Transition Assistance Group (UNTAG), Namibia, as a Field Service Assistant. He returned to UNTSO, Jerusalem, with effect from 20 June 1990. On 16 March 1991, his duty station was changed from Jerusalem to Gaza. On 1 April 1991, the Applicant was promoted to the FS-5 level, as Administrative

Assistant. On 20 April 1992, the Applicant was temporarily assigned to the United Nations Transitional Authority in Cambodia (UNTAC). On 24 December 1992, the Applicant was summarily dismissed for serious misconduct.

Upon his arrival in Gaza, on 20 March 1991, the Applicant was paid $6,358.04, representing an assignment grant payment, consisting of a daily subsistence allowance (DSA) portion and a lump sum portion. On 4 July 1991, he was credited with $8,404.03, representing a DSA from the date of his arrival in Gaza, less the amount of $6,358.04. This followed a determination that he was entitled to a DSA but not to an assignment grant. On 10 July 1991, the Applicant was paid $2,195.93, representing a "Gaza incentive" for the period from his arrival to 30 June 1991. The Applicant received payment of a DSA plus $642.19 per month "Gaza incentive" for July, August, and September 1991. On 15 October 1991, recovery of the "Gaza incentive" - a total of $3,870.89 - was ordered by the Administration. Payments of DSA for November and December 1991, and for January 1992 were withheld for that purpose.

While stationed in Gaza, the Applicant acted as Manager of the UN Reporting and Evacuation Centre in Gaza (the REC House), which included the Gaza Beach Club (the Club), a recreational facility, managed not by the Organization but the staff. On 29 February 1992, in the presence of the Applicant, a surprise cash count of the funds of the Club was conducted and a cash deficit was found.

On 16 March 1992, the Chief Administrative Officer (CAO), UNTSO, Jerusalem, transmitted to the Applicant a copy of a memorandum to him, dated 10 March 1992, from the Field Administration Officer, UNRWA, Gaza, reporting on the cash count that had been conducted and indicating that a discrepancy of $6,543.49 had been found. The CAO requested a "written explanation on this subject" from the Applicant and advised him "your immediate action is to return all the funds that were missing soonest."

In his reply dated 20 March 1992, the Applicant stated that he had "borrowed some money (recorded) from the profit" of the REC House, which he intended to repay upon receipt of a loan he had applied for. He explained that what compelled him to borrow this money was "unexpected drastic change in my entitlements of Gaza mission," which had created financial hardship. He further stated that, at the time of the surprise cash count, he had informed the officials present of the situation.

In a memorandum to the Applicant, dated 2 April 1992, the CAO noted that the missing sum of $8,800.00, had been repaid. He further stated:

> "Your explanation together with an apology provides me with the background to this matter. There remains, however, the fact that you provided yourself with an unauthorized loan in the form of a significant sum of money from funds you were holding in trust on behalf of the UN community in Gaza. The officers of the REC-House Management Committee have advised me that they are satisfied with the apology and the settlement now being made and they are not pressing any charges against you. But they, as well as I, are most disappointed over your act. Your performance in Gaza had been considered as very good - and without any blemish - until the audit visit on 29 February 1992, and you were even promoted to the FS-5 level during your tour of duty there.
>
> Had the REC-House funds been under the official administration and control of the UN, it would have been my duty to inform the UN Controller of what happened, with every possibility of serious consequences for yourself. I must advise you that I still consider your act as totally unacceptable. As your direct supervisor I reprimand you in the strongest possible terms. I trust that you will understand this and refrain from any similar act in the future, whatever may be the state of your personal finances.
>
> I am copying the present memorandum, as well as the preceding correspondence to the Chief of Staff, UNTSO, and to ..., Chief, Field Personnel Section, at FOD, Headquarters."

On 4 May 1992, the Director of Staff Administration and Training Division, Office of Human Resources Management (OHRM), advised the Director, Field Operations Division, Office of General Services, that the matter should be reported to the Controller and that OHRM was "considering the case to determine whether disciplinary proceedings should be initiated".

On 29 May 1992, the CAO advised the Applicant that OHRM had requested him to initiate disciplinary proceedings in accordance with ST/AI/371. After informing the Applicant that he was charged with misconduct, he asked him to provide a response in writing, or produce countervailing evidence. He also advised the Applicant of his right to seek the advice of another staff member or retired staff member to assist him.

On 7 August 1992, the Applicant provided a written response to the charge. He stated, inter alia, that he had borrowed the money because, as a result of a retroactive change in the nature of his reassignment from Jerusalem to Gaza, the Administration had determined that he was not entitled to the allowances and entitlement payable in case of a within-mission transfer, and that he was required to repay certain amounts which had been paid to him. He claimed that the "painful execution [of the decision] with retroactivity put [him] in financial straits." He also stated that he began borrowing from the REC House/Beach Club funds in November 1991, and attached copies of IOU receipts, kept in his personal file, which recorded the transactions, from 5 November 1991 to 30 January 1992, for a total amount of $8,800.00. He stated that he had informed the UNRWA Field Finance Officer who audited the REC House/Beach Club of his borrowing before the audit was conducted. He claimed that his motive was not to embezzle funds but "to borrow a quick short-term loan which [he] intended to repay as soon as [he] got [his] pending UN Credit Union loan approved." He noted that the full amount had been repaid on 1 April 1992.

On 23 October 1992, the Assistant Secretary-General for Human Resources Management recommended to the Secretary-General that the Applicant be summarily dismissed. This recommendation was endorsed by the Legal Counsel, and approved on behalf of the Secretary-General by the Under-Secretary-General for Administration and Management. In a letter dated 25 November 1992, the Director of Personnel informed the Applicant of the Secretary-General's decision to summarily dismiss him for "serious misconduct", effective "at the close of business on the day on which you receive this notification." The Applicant, who was then serving in Cambodia with UNTAC, received the letter on 24 December 1992.

On 3 February 1993, the Applicant requested a review by the Joint Disciplinary Committee (JDC) of the decision to summarily dismiss him. The JDC adopted its report on 18 October 1993. It recommended that "the Secretary-General maintain the decision already made." On 10 November 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and advised him that the Secretary-General had decided to maintain his decision.

On 31 May 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's only discernible fault is not dishonesty, but rather naïveté in failing to comprehend the implications of his actions despite a scrupulous effort to record, report and rectify them, rather than concealing or denying them.

2. No United Nations funds were involved, nor was the Applicant's error committed while exercising a United Nations function.

3. Summary dismissal was a disproportionate penalty for the harm, if any, caused to the United Nations.

4. Although the Secretary-General has broad discretion with regard to disciplinary matters, that discretion must not be exercised with the degree of arbitrariness exhibited in this case.

Whereas the Respondent's principal contentions are:

1. The decision to dismiss the Applicant was a proper exercise of the Secretary-General's discretionary authority in disciplinary matters.

2. The Applicant's due process and procedural rights were fully respected.

The Tribunal, having deliberated from 30 October to 21 November 1995, now pronounces the following judgement:

I. The Applicant's case consists of two main claims; first, that proper procedures were not observed and secondly, that mitigating factors were not taken into account, i.e. that the penalty was too severe.

When the financial discrepancy was first discovered, the Applicant readily admitted his guilt and repaid the money, albeit after the discovery of the discrepancy. Subsequently, the Chief Administrative Officer (CAO), UNTSO, Jerusalem, requested an explanation from the Applicant. The Applicant now complains that, at that stage, he was not informed of his right to seek assistance from another staff member or a retired staff member. The Applicant responded to the CAO's request and he now says that his response was used subsequently as the basis of disciplinary action.

The Applicant also complains that he was not informed of an UNRWA audit conducted on 24-28 March 1992 and so did not have the opportunity to respond to it.

II. The first part of this episode ended with the CAO's reprimand of the Applicant. The Beach Club expressed the view that the Applicant's failure to obtain prior approval was a mistake to which a stern admonition was a sufficient response.

The matter did not end there. The CAO was requested by the Office of Human Resources Management to initiate disciplinary proceedings against the Applicant. He was asked to give an account in writing or to produce countervailing evidence. He was advised that he could seek the assistance of a current or retired staff member to represent him. He was told that he could contact the staff representative for this purpose. The initial disciplinary proceedings ended with a recommendation that the Applicant be summarily dismissed for serious misconduct.

III. The Applicant sought a review by the Joint Disciplinary Committee (JDC). He now contends that the JDC did not conduct an independent review of the issues, and that it did not carry out its own review of the facts.

Even if the JDC made use of information obtained in an earlier investigation and even if that investigation could be said to have been carried out in a manner which did not fully recognize the Applicant's rights, it is difficult to see how this was prejudicial to the Applicant. In the CAO's investigation, the Applicant admitted his guilt.

The JDC, as well as being in possession of the results of the preliminary investigation, did carry out its own investigation. It

met twice and only then did it reach its conclusion. The Tribunal is satisfied that the JDC conducted its review properly.

IV. But what of the Secretary-General's decision to dismiss the Applicant?

The Applicant had served the Organization for many years with an unblemished record. Indeed, he was highly thought of and his ability and hard work were never in doubt.

He engaged in voluntary work at the Beach Club for the benefit of UN personnel.

The records which he kept when taking the money would appear to indicate an intention to repay it, which he subsequently did, by means of a loan which he obtained.

As a result of an unexpected reduction in his income, resulting from a mis-classification of his assignment by the Administration, the Applicant says he found himself in financial difficulties. While under pressure, he sought to solve the problem in an unacceptable manner, but he promptly admitted his guilt on enquiry and made restitution.

V. The Tribunal recognizes the Secretary-General's wide discretion in disciplinary matters and in determining what is serious misconduct. The Tribunal notes that there were mitigating facts, i.e. the fact that the Beach Club was prepared to close the matter and is connected only in a peripheral manner with the Organization, the circumstances in which the offence was committed, and the manner in which the Applicant made amends. However, despite such factors, because of the seriousness of the offence, the Tribunal must conclude that the Respondent was justified in summarily dismissing the Applicant.

VI. The Tribunal, therefore, rejects the application.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary